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NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No. 2)

DOCUMENT RESUME

ED 203 453 EA 013 640

TITLE	ECS Law & Education Center Footnotes. No. 3.
INSTITUTION	Education Commission of the States, Denver, Colo. Law and Education Center.
SPONS AGENCY	Spencer Foundation, Chicago, Ill.
PUB DATE	Jun 80
NOTE	13p.
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Court Litigation; *Educational Vouchers; Elementary Secondary Education; Evaluation; *Intelligence Tests; *Legal Problems; Minimum Competency Testing; *Nontraditional Education; Racial Balance; Racial Bias; Racial Discrimination; School Desegregation; Test Bias
IDENTIFIERS	*Educational Choice; *Larry P v Riles; North Carolina

ABSTRACT

Commentary and advice in four legal areas are offered in this newsletter on educational law. First, the document outlines preventive legal review for public educators in four basic steps, including anticipation of legal challenges, evaluation of the challenges' legal merits, consideration of the policy issues raised by potential challenges, and modification of policies in response to the first three steps. Second, the authors briefly note a new suit against North Carolina's competency testing program. Third, the newsletter devotes considerable space to the legal ramifications of family choice in education. It discusses three choice plans (the free choice, free transfer, and tuition voucher systems) in relationship to desegregation and racial imbalance, describes several states' statutes regarding racial discrimination, and recommends guidelines for a constitutionally acceptable tuition voucher plan. Finally, the document examines the Larry P. v. Riles decision on racial bias in intelligence testing, covering the trial judge's analysis of discriminatory intent, the plaintiffs' remedy, and the defendants' appeal. (RW)

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ECS Education Commission of the States
LAW & EDUCATION CENTER
FOOTNOTES
No. 3 June 1980

ED203453

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23 The Carnegie grant mentioned in Footnote 14 (*Footnotes*, February 1980) enabled the Law and Education Center (LEC) to hire a *new staff attorney*. Patricia M. Lines was chosen from over 30 lawyers who applied for this position. Lines received her J.D. degree from the University of Minnesota Law School and has been employed by the U.S. Department of Justice, Harvard University, the Battelle Human Affairs Research Center, the University of Washington and, most recently, the U.S. House of Representatives. The most recent of her numerous publications in various law and education journals is "An Equal Choice Plan for Eliminating School Segregation," 56 *Texas Law Review* 1245-1270 (1978). Lines started work at LEC on May 1 and will specialize in one or two areas of education law that will be announced in a subsequent issue of *Footnotes*.

24 As emphasized in the first two issues of *Footnotes*, the primary purpose of the ECS Law and Education Center (LEC) — which is based on the premise that "an ounce of prevention is worth a pound of cure" — is to provide *preventive legal assistance* to states in certain specialty areas. Although attorneys in private practice provide substantial preventive assistance to their clients, preventive law appears to be less often and less effectively practiced in public education and other public sectors. The explanation for this disparity is no doubt complex, but is partly explained by limited public resources that are absorbed by litigation and other activities that deal with problems *after* they occur.

By the time problems are litigated, however, the positions have usually polarized and all parties

Education Commission of the States

FOOTNOTES is supported under a grant from the Spencer Foundation and is published on an occasional basis by the ECS Law and Education Center. It is free of charge to primary ECS constituents and their legal counsel; $10 per year for others. It is the policy of the Education Commission of the States to take affirmative action to prevent discrimination in its policies, programs and employment practices.

have lost considerable control over the resolution of their differences. Anyone who has been involved in litigation knows how expensive, time-consuming and painful that process can be for all parties. Some of this litigation is necessary, but some of it is not and is preventable if the parties were to devote more of their attention and resources to preventive law focusing on potential legal problems at the policy formulation and implementation stages. This is especially the case in public education where continuing litigation between students and school authorities has contributed to an increasing legalization of education.

Competency tests used as a prerequisite to a high school diploma provide a timely example. Given the potential injury to all students failing the test (in effect, state certification of incompetence) and the disproportionate numbers of minorities likely to fail the test in most states (a trigger for legal analysis), legal challenge and judicial scrutiny of such competency testing programs was and still is predictable. Careful consideration of the predictable challenges and their legal merits could lead to modifications in policy and implementation that might avoid or at least minimize the kind of litigation exemplified by the *Debra P.* (summarized in the first issue of *Footnotes*) and *Iwanda H.* (see Footnote 25) cases. Fourteen other states have diploma-based competency testing programs raising similar legal questions, and many other states and school districts are considering comparable programs. Preventive legal analysis in all of these states and districts would be well advised, especially in light of the *Debra P.* decision.

Competency testing programs provide only one example. *All new education programs initiated at the state or local level should be subject to preventive legal analysis prior to final policy formulation and implementation*, especially if they will have a significant impact on any of the main participants in the education process (students, parents, board members, teachers and administrators). This kind of preventive legal review is important for at least three reasons. First, extensive case and statutory law at both the federal and state levels now provides an elaborate legal framework within which the education process must function. Second, a national network of legal services attorneys and other groups concerned about the civil rights of students exists to enforce the rights guaranteed by this extensive case and statutory law. (The other main participants mentioned above, of course, have access to legal representation.) Third, as a result of these first two reasons, preventive legal review can help to minimize not only infringement of civil and other legal rights, but also the time and expense of litigation. Some states may already have more than *pro forma* legal review of proposed education policy, but the record suggests that such review is not practiced often or well in many states.

Preventive legal review should include four basic steps: (1) *Anticipation* of legal challenges; (2) *Evaluation* of the legal merits of these challenges; (3) *Consideration* of the policy issues raised by potential challenges; and (4) *Modification*, where appropriate, in response to the first three steps. These four steps are described in more detail as follows.

Step 1: Anticipation. The first step is to anticipate in some detail the potential legal challenges likely to be brought against the proposed education policy. Which persons or groups affected by the new policy are likely to file litigation and on what legal theories and facts are they likely to rely? This step requires policy makers and their legal counsel to consider the proposed policy from the viewpoint of prospective litigants. Two important triggers for legal analysis can help in this determination. First, will the policy cause potential injury (educational, occupational, psychological, etc.) to any person or persons? If there is no injury, there is no basis for litigation. Second, will the policy cause disproportionate effects among any racial, linguistic, ethnic or other protected minority group? This is simply another way to identify injury, but is listed separately since racially disproportionate effects provide the classic trigger for judicial analysis. Such disproportionate effects by themselves usually do not constitute illegal action (*see* Footnotes 29 and 30), but they raise the legal issues that need to be evaluated in Step 2. Identifying this kind of injury can help anticipate the legal theories that are likely to be advanced.

Sometimes it is difficult to anticipate such legal arguments and it may be advisable to consult with affected groups and their attorneys. Policy makers at the state or local level can hold hearings or arrange meetings without being locked into policy advocated by these persons. In addition to helping anticipate legal problems, this process can also help identify policy modifications or alternatives that may have been overlooked. Since identification of the legal issues and theories often takes as much time as evaluation of their merits, this approach can also minimize time and expense. Some may contend that involvement of potential litigants at this stage might *encourage* and even *cause* rather than *anticipate* litigation. In some cases this may be true, but given the national network of attorneys mentioned above, it is unlikely that any significant education policy raising substantial legal questions will go unnoticed and unchallenged. For example, any competency testing program having the effect of withholding diplomas from disproportionate numbers of black or other minority students is unlikely to escape legal scrutiny. But the question of

how best to anticipate potential arguments, and whether the costs of outside involvement outweigh the benefits, probably should be made on a case-by-case basis.

Step 2: Evaluation. The second step is to evaluate the legal merits of the anticipated legal challenges. While the first step need not involve a lawyer, this second step requires involvement of the policy makers' legal counsel. Like a judge, the lawyer's task at this stage is to consider the merits of the legal issues raised by all parties to the litigation, and then evaluate their respective merit. This task is more difficult where the proposed education policy is new and courts in other jurisdictions have not had a chance to consider the merits of similar policy. Before the *Debra P.* case, for example, attorneys had to look to factually different but legally analogous cases to evaluate the merits of potential legal challenges to competency testing programs. Attorneys are in a better position to make these evaluations given the *Debra P.* opinion, but that opinion needs to be considered in light of the exact competency testing program proposed and the exact factual situation presented by the state or school district. As legal challenges to similar programs are heard by other courts, a judicial pattern and more predictable case law will eventually take shape, but states and districts will be better served if preventive legal review can keep them from contributing to this judicial pattern.

An attorney will not be able to provide an opinion on most issues without taking some time for research and analysis, but the time and expense of this kind of preventive legal review is minimal compared to that involved in litigation. This kind of review in most cases should lead to a legal opinion and supporting rationale on the legal vulnerability or invulnerability of various aspects of proposed policy. No one can predict with absolute certainty how a court will resolve most legal issues, however. Therefore the evaluation might use a five-part continuum to indicate that in the attorney's best judgment a particular aspect of proposed policy is (1) highly likely, (2) likely, (3) gray area, (4) unlikely or (5) highly unlikely to be found illegal by a court. Of course, the quality of lawyering, like that of teaching or other professions, varies greatly from individual to individual, and some attorneys have more appropriate experience and a better "track record" than others.

Step 3: Consideration. The third step is consideration of the policy issues raised by the potential legal challenges. Policy issues can be defined in this context as issues raised by the legal challenges, but which have been evaluated in Step 2 as falling within the gray area or unlikely categories of the five-part continuum mentioned above. This step can provide a useful perspective for policy makers prior to finalizing new education policy since some legal arguments, even if unlikely to prevail in the courts, suggest standards of fair play.

Consider, for example, the *Debra P.* case where the court required prior notice and phase-in of the diploma requirement, avoided the question of adequate match between test and instruction, and held that the law does not require the test instrument to meet professional psychometric standards. (See the first issue of *Footnotes* for details.) Even if the eventual case law on competency testing does not require some kind of match between what is measured by the test and what has been taught in school, most persons would probably agree that this is an essential component of any fair competency testing program where high school diplomas are at stake. Similarly, prior notice to students and gradual phase-in periods will probably strike most persons as important even if other courts do not follow the *Debra P.* Court's holding in this area. And most policy makers would want tests used for such important purposes to be considered psychometrically valid and reliable regardless of their legality or illegality. Of course one of the lawyer's responsibilities to the policy makers is to clarify to the extent possible the line between policy options and legal requirements.

Step 4: Modification. The fourth and final step is modification of the proposed policy, where appropriate, in light of the information generated by the first three steps. This modification may be based on the policy makers' consideration of legal vulnerability indicated by Step 2, by policy considerations highlighted by Step 3, or by a combination of legal and policy considerations. Modification may be based, for example, upon a combination of a Step 2 evaluation indicating a "gray area" of the law and a Step 3 consideration of policy issues generated by the legal inquiry.

Modification based on legal considerations should of course be consistent with the underlying legal rationale. Providing a euphemistic name for a functional literacy test, or differentiating diplomas by seal or color, are examples of policy revisions that are not likely to cure legal problems in diploma-based competency testing programs.

In formulating and implementing new education policy, legislators and educators need a working knowledge of constitutional and statutory law. Public education is a field where this legal knowledge is especially important because so many of its activities affect the civil rights of students. Since

most elementary and secondary students are compelled by law to attend school, courts usually review more carefully those education programs and policies that affect students. Therefore the education policy makers' knowledge of law should include an understanding of basic legal principles, such as due process and equal protection, as well as recent developments in case and statutory law. Periodic training and workshops in education law serve this goal, and more attention by education policy makers and their legal counsel to applying legal knowledge to the kind of preventive law activities discussed in this Footnote could pay valuable dividends in avoiding or minimizing litigation. (Note: The ECS Law and Education Center is available to contract with states to provide preventive legal assistance in competency testing and other specialty areas.) *—MSM*

25 On May 2, 1980, attorneys for three black students attending Charlotte-Mecklenburg public schools filed a complaint challenging *North Carolina's competency testing program.* The case, *Iwanda H. v. Berry*, No. CC 80-0156 (W.D.N.C., Charlotte Div., complaint and motion for preliminary injunction filed 5/2/80), raises claims similar to those in *Debra P. v. Turlington*, 474 F.Supp. 244 (M.D. Fla. 1979), which resulted in a four year injunction against Florida's competency testing program.

As in *Debra P.*, named plaintiffs in *Iwanda H.* claim that the state's competency testing program carries forward the effects of past racial discrimination and unequal education opportunities in violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974. Plaintiffs allege that this discrimination has caused disproportionate numbers of black students to fail the test, and they seek to represent a class of approximately 3,100 black 12th-grade students in North Carolina who failed the test and therefore will not receive a regular high school diploma. They claim that 7.7 percent of the black 12th-grade students have failed the reading test compared to only 0.7 percent of their white counterparts, and 10.7 percent of the black 12th-grade students have failed the reading test compared to only 1.2 percent of their white counterparts (par. 23).

Denial of procedural and substantive due process of law is also alleged: "Plaintiffs and members of their class attended the first nine years of public school without any warning that they would be subjected to a special competency test or any other criteria for receipt of a high school diploma, other than satisfactory academic grades" (par. 34). Plaintiffs also question the validity and reliability of the test, and claim that "the test has not been related in a satisfactory way to the curriculum or the instruction which plaintiffs and members of their class have actually been provided" (par. 21). Named defendants include both the superintendents and the boards of education for the Charlotte-Mecklenburg public schools and the state of North Carolina. *—MSM*

26 *Family Choice* is among the possible specialty areas being explored by the ECS Law and Education Center. For LEC's purposes, family choice will refer to choices made available to each family or to the student in the case of older students, which permits individualized selection among schools, programs, courses, classrooms or school systems. Examples of family choice include the availability of elective courses, experimental alternative schools or magnet schools, tuition voucher programs, and proposals for tax credits or other tax benefits to enable families to choose private school systems.

While the availability of such individualized choice is generally welcomed by families and students, certain methods for providing choice may present serious legal and constitutional difficulties. Specific examples are discussed as follows.

Where choice is generally made available, the denial of choice to specific students might also pose legal hazards. Tracking, either formally or informally through counseling, is an example of denial of choice. Some examples of legal problems likely to occur if choice is restricted will be presented in the next issue of *Footnotes*. The types of legal problems likely to arise if family choice is offered or denied in a questionable manner include (1) problems stemming from possible segregative impact or intent which may violate the Fourteenth Amendment's equal protection clause or federal laws such as Title VI of the 1964 Civil Rights Act; (2) potential difficulties with the religion clause of the First Amendment; (3) problems relating to exclusion of children too poor to pay fees, if access to particular courses or programs is made dependent on fees; (4) problems relating to the child's right to a hearing and other procedures prior to denial of choice. These legal problems will be discussed in the following Footnotes and in the next issue of *Footnotes*. *—PML*

27 A so-called "*free-choice*" *system* was developed in the South in the 1960s in response to court orders to desegregate following *Brown v. Board of Education.* Such a plan was found invalid by the Supreme Court in *Green v. County School Board*, 391 U.S. 430 (1968). In *Green* the plan developed by the board of the New Kent County, Virginia school district consisted of a choice between only two public schools, one which had been completely black, and one completely white, prior to implementation of the choice plan. The school board required students at two grade levels to choose between the schools; students in other grade levels were assigned to the school previously attended (perpetuating the previous illegal segregationist policies), but could choose the other school if they so wished. After three years of operation, no white student had selected the still all-black school; 115 blacks (15 percent of the total black student population) had chosen the previously all-white school. The Supreme Court held the plan inadequate for failure to eliminate identifiable one-race schools.

Noting the absence of significant residential segregation in the county and the ease with which a traditional neighborhood assignment plan would achieve racial balance, the Court qualified its holding:

> We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional. . . . Where it offers real promise of aiding a desegregation program . . . there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial system, "freedom of choice" must be held unacceptable.

Following *Green* a few school districts under court order to desegregate continued to attempt freedom of choice plans, some of which were approved by lower courts. As a result there is a history of very recent litigation of the *Green* type, with these free choice plans still found invalid for failure to eliminate identifiable one-race schools. *See* for example, *Lee v. Marengo County Board*, 588 F.2d 1134 (5th Cir. 1979); *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (Clark County, Nevada); *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *affirmed*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (Boston). In the Marengo County and Clark County cases, the system was given a one-year trial, but failed to achieve desegregation results. In Boston, a proposed choice plan, which included a large number of magnet schools, was rejected prior to implementation on grounds that an earlier choice plan in Boston and free choice plans elsewhere had not proved workable.

In short, where the district is under a legal obligation to desegregate schools, as was the case in *Green*, a choice plan will be unacceptable if it fails to remedy past wrongs. Where the district is not under such an obligation, the analysis may be different, as is discussed in Footnote 29. —*PML*

28 A "*free transfer*" *plan* was another procedure developed about the same time as the free choice plan described in Footnote 27. The school commissioners of Jackson, Tennessee, also under court orders to desegregate, drew up new school district attendance areas that eliminated to some extent the previously extreme *de jure* segregation. However, at the same time, the commissioners allowed any child to transfer out of the school of assignment on request, with the result that all of the white children assigned to a school which had previously been restricted to black students had opted to transfer elsewhere, and many of the blacks had similarly transferred from the "white" schools to the previously "black" schools.

Again, the Supreme Court declared such a system to be invalid as a remedy for correcting past wrongs because it failed to eliminate identifiable white and black schools, *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968). Again, the case technically applies only to districts under a legal obligation to desegregate, but it has important implications for other districts as well.

In a desegregation suit in St. Louis, a limited free transfer plan was cited as among the actions of the school board sufficient to subject it to a court order for deliberate resegregation following the city's successful desegregation efforts in the wake of *Brown v. Board of Education.*

The transfers consisted of three types, one, as in *Monroe*, had been adopted after implementation of the post-*Brown* desegregation plan, and consisted of transfers to allow students to continue in the school where they had matriculated, and was phased out as students graduated from their respective schools. The court held that there was no evidence of a racially disproportionate effect of this plan in the record, as the school district had meticulously refused to keep records of race of students as part of its desegregation plan. (Some unofficial evidence suggested that about 40 percent of the blacks remained in the previously all-black school, but it was not clear whether this was by transfer or by assignment.)

A second type of transfer from the assigned school was made available to permit students to take a desired course not offered at the assigned school. This led to a number of transfers of white students from a school becoming increasingly black, for the stated purpose of taking German at another high school. After the transfers reached around 30, the board offered German at both schools, eliminating the transfer possibility.

The court found medical transfers were granted judiciously, and under very limited circumstances. The court concluded that there was no evidence that the free transfer opportunities had contributed to racial segregation in the system, *Liddell v. Board of Education*, 469 F. Supp. 1304 (E.D. Mo. 1979).

The case was appealed to the U.S. Court of Appeals for the Eighth Circuit, which disagreed with the district court's conclusion that the effects of past discrimination dating prior to 1954 had been cured. The U.S. Supreme Court refused to stay the desegregation order required by the appellate court. *See Education Daily*, May 20, 1980, p. 1. In effect, the appellate court viewed St. Louis as still under an obligation to desegregate resulting from deliberate wrongful acts taking place prior to 1954, placing it in the same position as the school district in *Monroe*.

For school districts innocent of past wrongs, adoption of a free transfer plan is subject to a slightly different set of rules, but, as discussed in Footnote 29, a marked effect on racial imbalance as a consequence of the new plan may be evidence of wrongful segregation. However, limited use of free transfers for legitimate purposes, especially where they are monitored carefully to assure that they do not contribute to racial imbalance, would appear to be acceptable to the courts. —*PML*

29 *Racial imbalance as a result* of any family choice plan can provide the evidence needed to prove illegal segregation in a system. Of course, a finding of illegality must rest on intentional state action to segregate, and racial imbalance among schools, standing alone, will not subject a school district to a court order to desegregate. This principle was made most clear in nonschool cases. In *Washington v. Davis*, 426 U.S. 229 (1976) the Supreme Court refused to allow an inference, based only on a disproportionate exclusion of minorities, that certain testing used to help select government employees violated the Constitution. In *Village of Arlington Heights v. Metropolitan Housing Development Corp. (MHDC)*, 429 U.S. 252 (1977), the Court held that a refusal to rezone an area, perpetuating the disproportionate exclusion of lower income residents (which would include more minorities) was not a violation of the Constitution, as the evidence indicated no segregatory intent, but only a desire to continue a current zoning pattern and to protect property values.

Racial imbalance stemming directly from a policy or action of a school board can be evidence of the required illegal intent, however, as explained by the Supreme Court in *Columbus Board of Education v. Penick*, 443 U.S. 449, 464—65 (1979):

> . . . actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases [*Washington v. Davis* and *Village of Arlington Heights v. MHDC*], do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." . . . Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn" [quoting the district court opinion].

Moreover, a number of federal appellate courts have held that actions which have a "natural, probable and foreseeable" result of increasing racial imbalance will give rise to a presumption of illegal intent, shifting the burden to the school district, which must then produce evidence of its good intentions sufficient to overcome the presumption. *See, Arthur v. Nyquist*, 573 F.2d 134, 142-43 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 179. Even in the absence of such a presumption, a plaintiff may be able to find supplementary sources of evidence, which along with increased racial imbalance, will be adequate to prove illegal intent. For examples of such sources in a specific factual context, see the discussion of *Village of Arlington Heights* in Footnote 33.

For districts under court order to desegregate, moreover, adoption of any type of choice plan may run afoul of the requirement that all vestiges of past segregation be removed (as required in *Green* and *Monroe*, discussed in Footnotes 27 and 28).

Districts that are not under court order, but which have had a history of practicing deliberate acts of segregation, will be given similar treatment. That is, once the historical segregationist policies are established in a court of law, subsequent actions that fail to remedy the segregation, or may even

exacerbate it, will be taken into consideration and may lead to a finding of illegality, and to a systemwide remedy, while in another district the more recent actions and policies may be considered valid, or if invalid, lead to a desegregation order limited to the correction of those specific actions (*see* generally, *Dayton Board of Education v. Brinkman*, 443 U.S. 526 [1979]).

In *Dayton* the strongest evidence of segregation was based on policies that had long been discontinued (such as barring blacks from school swimming pools and segregating facilities). However, effects from these past illegal policies had never been fully eradicated, and the board's present policies (maintaining optional attendance zones and rescinding some desegregation resolutions) were found to exacerbate the effects of prior segregation, and regardless of present intent, to subject the district to a systemwide desegregation decree.

A district completely innocent of past wrongs would still have to be concerned about the foreseeable consequences of its policies and actions, but if it had very solid and convincing evidence that the policies had legitimate goals, and the shift in racial balance was not too marked, the district would probably be free from liability under the Constitution. To be on the safest ground possible, the district should monitor the effects of its choice plan, and make adjustments to promote racial balance wherever needed. Very few districts are completely innocent of past wrongs, and plaintiffs in a law suit are often willing to delve far into the district's past to find them. —*PML*

30 *State and federal statutes* may impose stricter standards than the constitutional standards previously discussed. For example, the Emergency School Aid Act (ESAA), 20 U.S.C. §1601 *et seq.* (1976), which is aimed at racial isolation as well as intentional segregation, provides for a cutoff of ESAA funds if there is a disproportionate racial impact as a result of school policy. *See Board of Education of City School District v. Harris*, 100 S.Ct. 363 (1979). The central issue before the court in *Harris* was whether the ESAA required an intent to segregate students. The law contains numerous references to racial isolation, and in a section critical to the case, which turned on alleged faculty segregation, the law provides for termination of funds if a district has engaged in "any practice, policy, or procedure which results in the disproportionate demotion or dismissal of . . . personnel from minority groups . . . or otherwise engaged in discrimination based upon race, color, or national origin." Both majority and minority opinions agreed that the language was ambiguous, with the majority determining that funds should be cut off upon proof of a racially disproportionate effect, regardless of intent, with respect to either demotion/dismissal or other personnel practices.

Some state laws also provide for funding termination or other penalties as a result of racial imbalance, regardless of intent. *See* for example, *Massachusetts Racial Imbalance Act, 15 Mass. Gen. Laws* §§1I—1K (Supp. 1980); 71 Mass. Gen. Laws §37C *et seq.* (Supp. 1980), *upheld, School Committee of Boston v. Board of Education*, 352 Mass. 693, 227 N.E. 2d 729 (1967), *appeal dismissed for want of a substantial federal question*, 389 U.S. 572 (1968).

Finally, the argument has also been made that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* (1976), proscribes racial imbalance alone, and not just intentional acts creating such inbalance. The law provides that "[n]o person . . . shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance."

In fact, the regulations established by the Department of Health, Education and Welfare indicate that Title VI forbids racially disproportionate effects, whether intended or not. 45 C.F.R. §80.3 (b)(2) (1979). DHEW's language goes beyond traditional analysis under the Constitution, where a deliberate, intentional act of discrimination is a prerequisite to illegality, and a racially disproportionate effect is only evidence of such illegal intent.

These regulations must be within the general bounds of the statute, and they have not yet faced a direct challenge at the Supreme Court level. There is some support for the DHEW view in a 1974 Supreme Court case, *Lau v. Nichols*, 414 U.S. 563 (1974), but the case contains considerable ambiguity. In a more recent case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), there is some indication on the part of five Justices that Title VI as a general rule, follows the same standards established under the Constitution, but intent was not an issue. *Bakke*, at 287, 315. In a still more recent case, *Board of Education of City School District v. Harris*, discussed above, three dissenting Justices indicated their view that *Bakke* required intentional discrimination under Title VI, *Harris*, at 379, while the majority opinion suggested that this might be the case. In short, the Supreme Court has not issued a definite statement on the requirement of intent under Title VI, but the clues point toward

a standard similar to that followed under the Constitution, where disproportionate impact is not illegal, but may raise a presumption of illegal intent (*see* Footnote 29).

It all boils down to a question of statutory interpretation, and a district would be well-advised to obtain legal counsel in identifying and interpreting the statutes relevant to that district that may proscribe racial imbalance even if it results from a neutral policy. In such cases, the district must avoid choice plans that would create such imbalance, regardless of the educational and other merits of the plan. Even where a district need only worry about the Constitution and Title VI, and even if Title VI is conclusively found to mirror the requirements of the Constitution, virtually all districts must nonetheless avoid choice plans that produce racial imbalance, because the courts will consider the clear and foreseeable results of a policy as evidence of illegal intent and may place a burden on the school district of establishing its good faith (*see* Footnote 29). —*PML*

31 *Tuition voucher systems* offer a relatively new and untested method of providing family choice. Under such systems, some central agency provides a voucher to families with eligible children, and redeems the voucher after it has been surrendered in payment for schooling at an approved school. Depending on how they are designed, such plans could produce racial and economic segregation. For example, unless restricted from doing so, expensive private schools would undoubtedly require families to pay for a child's schooling with a voucher plus cash, effectively eliminating access to the school by those unable to produce the extra cash.

Even where the voucher must be accepted by participating schools as full payment in exchange for full educational services, subtle or not-so-subtle clues may lead families to identify some schools as "for blacks," others "for whites," and so forth. The development or worsening of racial imbalance in a district following implementation of a voucher plan might give rise to liability for deliberate racial segregation. Although there must be unconstitutional state action behind the imbalance to make it illegal under the Constitution, courts could conclude that the district knowingly enforced the racially motivated preferences of individual families, or could hold that the district adopted the voucher plan knowing that segregation would be the inevitable result, as is discussed in Footnote 29.

A voucher system that would probably pass muster was developed by the Office of Economic Opportunity (OEO), and later transferred to the National Institute of Education (NIE). The OEO-NIE plan endeavored to develop a number of controls designed to protect poor families and to avoid constitutional defects and adopted the following rules as necessary elements of any constitutionally and politically acceptable tuition voucher scheme:

(1) A local regulatory agency, the Education Voucher Agency (EVA), would operate an extensive parent and teacher education program.
(2) The value of the voucher for disadvantaged children would be greater than the regular voucher amount.
(3) The EVA would not cash vouchers for schools that violated any of the following rules.
   (a) No school may discriminate against pupils or teachers on account of race or economic status; and all schools must demonstrate that the proportion of minority pupils is at least as large as the proportion of minority applicants.
   (b) Schools must be open to all applicants. Where more students apply than can be accepted under predetermined capacity limits, the school must admit applicants on a fair and impartial basis, preferably by lottery.
   (c) The school must accept the voucher as full payment for all educational services at the school. No participating school may require parents to make additional out-of-pocket payments.
   (d) Schools must satisfy constitutional requirements under the First and Fourteenth Amendments.
   (e) All schools must make available to parents information concerning the school's basic philosophy on education, the number of teachers, teacher qualifications, facilities, financial position, and pupil progress. In short, schools must provide sufficient data to enable parents to make an informed decision in selecting a school.

(The OEO-NIE rules appear in a number of sources, *e.g.*, U.S. Department of Health, Education and Welfare-National Institute of Education, *Education Vouchers, The Experiment at Alum Rock* [1973]. The OEO-NIE study also examined several other issues in detail, such as teacher contracts, salaries and tenure, financial administration, cost estimates, and separation of church and state. For a more recent general discussion, see Institute for Contemporary Studies, *Parents, Teachers, and Children:*

Prospects for Choice in American Education [1977]. For an analysis of political problems arising under the OEO-NIE plan, see Cohen & Farrar, "Power to the Parents? — The Story of Education Vouchers," 48 *Pub. Interest* 72 [1977]).

To date, a full-scale tuition voucher system has not been tested. However, Alum Rock, a school district located within the boundaries of San Jose, Calif., has tested an adaptation of the OEO-NIE procedures with only the Alum Rock public schools participating as voucher schools. While this adaptation effectively insulated the public schools from competition with existing or new private schools, and even public schools in adjacent districts, it did provide some insights into the effect this type of choice plan has on racial balance.

During the first year of the equal choice plan in Alum Rock, families preferred neighborhood schools, sending less than 4 percent of the children to more distant schools. As families gained experience with the system, however, mobility among the children increased. In the second year of the program, an additional 8 percent of the children changed buildings, and over 18 percent of students receiving a voucher for the first time transferred to non-neighborhood schools. In addition there were separate programs with differing emphases within buildings and interschool movement within a building also took place. (*See* generally, D. Weiler, *A Public School Voucher Demonstration: The First Year at Alum Rock* [RAND Doc. No. R-1945-NIE, 1974].)

From fall 1972 to fall 1975, the blacks in the system increased slightly from 11.5 to 11.9 percent of the total school population. The school that had the heaviest concentration of blacks in 1972 (Slonaker with 27.4 percent black enrollment) remained nearly stable (increasing to 29.9 percent black enrollment in 1975). The school with the next most blacks (Arbuckle with 25.7 percent in 1972) lost blacks (dropping to 20.6 percent in 1975). The concentration of Spanish-surnamed children grew in the district from 51.3 percent in 1972 to 55.1 percent in 1975, and also grew in some schools. For example, the school with the largest percentage of this group in 1972, Coniff with 70.2 percent, increased to 75.9 percent in 1975. The school with the next largest percentage was San Antonio with 66.9 percent, which increased to 73.4 percent in 1974. On the other hand, one school, Ocala, had no Spanish-surnamed children in the fall of 1972 and had 43.4 percent in 1975. Overall, racial ratios were fairly stable, and in the 1975-76 school year the minority population in 15 of 25 schools was within 10 percentage points of the district-wide total. Alum Rock Union Elementary School District, *Racial Ethnic Percentages Report* (October 1974) and *Student Racial/Ethnic 1975-76* (winter 1975) (reports on file at Alum Rock Public Schools).

The Alum Rock experience provides an encouraging illustration of the potential utility of an equal choice system as a means of promoting some racial balance without sacrificing educational development. The Alum Rock experiment, initiated in the context of pre-existing racial balance in schools and neighborhoods, illustrates the ability of an equal choice plan to retain and even somewhat enhance balance while promoting the education goals of the system. It would be expected that such a choice system could achieve better school racial balance compared to a pupil assignment system based exclusively on proximity to schools where residential imbalance is severe.

If improperly done, however, a voucher-type system could exacerbate racial imbalance, and like any choice system with this result, stands a good chance of being unconstitutional (*see* Footnote 29). Pitfalls can occur if schools are allowed to charge extra fees and indirectly exclude those too poor (often minorities) to pay; if the parent information system is not providing sufficient information to insure informed choice; if the monitoring agency or others counsel families and students to select schools on a racial basis; or if some schools have in one way or another been identified as catering to one particular race to the exclusion of others. Further, for a district with an obligation to desegregate schools and eliminate all vestiges of past segregation, this type of choice system may not produce sufficiently dramatic improvements in racial balance. If any of these pitfalls appear likely, the district would be well-advised to avoid the choice system, or to modify it to accommodate a quota system at the same time. Suggestions for modifying a tuition voucher or similar system by somewhat restricting choice in order to achieve racial quotas, where necessary to satisfy court orders or other obligations to eliminate past wrongs are presented in Lines. "An Equal Choice Plan for Eliminating School Segregation," 56 *Texas Law Review* 1245, 1252-53 note 21 (1978). Briefly, families must rank schools in the order of their choice; then the family rankings, school capacity data and racial quotas are fed into a computer which maximizes choice within the capacity and quota restraints.

If properly done, a voucher system or some adaptation of it (such as use of the system to facilitate choice among schools within a single public school system), could promote racial balancing goals. Unlike systems based primarily on residence, a voucher scheme would not favor affluent (and usually white) families located near superior

schools. The ability to purchase a home in a particular neighborhood would not translate into the ability to choose a public school. Minority families seeking integration of their children into predominantly white neighborhood schools would be able to bid for seats in those schools on the same basis as neighborhood whites. Further, parents wary of busing their children to distant parts of a district could feasibly limit their choices to schools within a reasonable distance from their residences. Even though a greater level of minority representation might occur in some schools under a voucher scheme than that imposed by a rigid quota system, the element of choice exercised by all families under a voucher plan and the availability of expanded education opportunities through student mobility would hopefully reduce resentment toward assignment policies and the "white flight" that often accompanies less flexible court-ordered plans.

There are, of course, many objections to tuition vouchers based on other issues. The inclusion of parochial schools is an issue that will be discussed in the next issue of *Footnotes*. Many of the objections are cured by limiting the choices to public schools — producing a system more properly styled as "equal choice," rather than "vouchers." Although in many districts inclusion of parochial schools would broaden the pool of majority students and thus increase racial balancing potential, this development may not be advisable because of legal and political problems attending such a decision. —*PML*

32 The last issue of *Footnotes* (February 1980) included a summary of *Larry P. v. Riles*, No. C71-2270 RFP (N.D. Cal., decision 10/16/79), a federal district court decision holding that California school officials unlawfully discriminated against black children by using racially and culturally biased intelligence quotient (IQ) tests to classify and place them in classes for the educable mentally retarded (EMR). That issue also included a detailed summary of Judge Peckham's analysis of IQ test bias (Footnote 20) and federal statutory standards for validation of IQ tests used for EMR placement (Footnote 21). This issue continues that summary with Judge Peckham's federal constitutional analysis (Footnote 33), the remedy provided to plaintiffs and defendants' subsequent appeal (Footnote 34).

33 In addition to finding violations of federal statutory law (*see* Footnotes 19 and 21), Judge Peckham found that the *Larry P.* defendants had violated the equal protection provisions of the California and United States Constitutions (Slip Opinion, p. 3). Finding a violation of the California Constitution was relatively easy since the California Supreme Court has held that "the constitutional obligations of school boards in California include an obligation to undertake reasonably feasible steps to alleviate school segregation, *regardless of its cause*" *Crawford v. Board of Education*, 17 Cal 3d 280, 292 (1976) (emphasis added). Federal equal protection analysis is more difficult since, as explained in Footnote 29, racially disparate *effects* are not by themselves sufficient to establish a violation, and recent Supreme Court decisions are not clear on what role disparate effects can play in proving the *discriminatory intent* necessary to establish a violation.

"The difficult question of intent has moved to center stage" (p. 75), Judge Peckham observed and, since the federal statutory standards (Footnote 21) are not clear, he proceeded to discuss and find discriminatory intent under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. Judge Peckham noted that while a majority of federal appellate courts have "created a presumption that school boards and others charged with discriminatory intent intend the natural and foreseeable consequences of their actions" (p. 77), the appellate court in his circuit (the Ninth Circuit Court of Appeals) "has evidently adopted a more stringent test for intent" (p. 79), and therefore he applied other evidentiary sources indicated by the U.S. Supreme Court in *Village of Arlington Heights* for ascertaining intent. These evidentiary sources include, "in addition to (1) the impact of the official actions, (2) the historical background of the decisions, (3) the specific events leading up to the challenged decisions, (4) departures from normal procedural sequence, (5) substantive departures that suggest the outcome might have been different and (6) direct statements by SDE officials" (p. 85).

"First, it is obvious that the decision to require the administration of one of the approved I.Q. tests prior to E.M.R. placement had profound discriminatory effects" (p. 85). "The historical background of the I.Q. decision provides a second essential source of evidence" (p. 86). The evidence reviewed by Judge Peckham included (1) no effort made by defendants to develop racially neutral tests or other neutral criteria (p. 86), (2) in the face of public controversy over fairness of IQ tests and minority overenrollments, and a legislative resolution to study the problem, the state board of education adopted a resolution proposed by the State Department of Education (SDE) requiring the use of approved IQ tests for EMR placement (p. 87), (3) SDE compilation of a list of approved IQ tests solely on the basis of frequency of use, without

considering the question of bias (p. 87), (4) SDE official testimony (p. 88) and actions (p. 90) indicating belief that minority overenrollment in EMR classes accurately reflected the incidence of mental retardation (p. 88), (5) SDE failure to explore, monitor or follow-up on disproportionate EMR enrollments indicated by legislatively mandated reports (p. 91), (6) SDE failure to monitor implementation of procedural protections imposed by the legislature, even though one report revealed severe deficiencies in compliance (p. 91), and (7) other facts establishing a "pattern of SDE complacency in effective opposition to legislative concern about biased testing and disproportionate enrollments" (p. 89). These facts are used to support the general conclusion that "[t]he decision by the State Department of Education in 1969 to compel the use of standardized I.Q. tests clearly fails this test and reveals the impermissible intent to discriminate" (p. 85).

Having found discriminatory intent, Judge Peckham did not find the compelling state interest necessary to justify a racial classification under the equal protection clause's "strict scrutiny test." He concluded that defendants' asserted interest in fiscal control and need to avoid misclassification were not served by biased IQ tests and that defendants' contention of lack of alternatives for EMR placement was not based in fact. Judge Peckham also found that plaintiffs would prevail under an "intermediate standard of review" — between strict scrutiny and the permissive "rational basis" test — since defendants' EMR classification did not substantially further the purpose of the best possible education for students and was outweighed by the stigma, isolation and inferiority of EMR classes (pp. 95-97). *—MSM*

34 The *remedy* provided to *Larry P.* plaintiffs is designed to address "two specific problems: testing abuses, and the disproportionate enrollment of black children in special E.M.R. classes" (p. 103). Therefore Judge Peckham ordered permanent injunctive relief in three areas: (1) intelligence tests, (2) disproportionate placement and (3) reevaluations and other class relief.

1. *Intelligence Tests.* "Defendants are enjoined from utilizing, permitting the use of, or approving the use of any standardized intelligence tests . . . for the identification of black E.M.R. children or their placement into E.M.R. classes, without securing prior approval by this court" (p. 104). In order to obtain court approval, the majority of the State Board of Education must, *inter alia*, determine that the tests "(a) are not racially or culturally discriminatory, (b) will be administered in a manner which is nondiscriminatory in its impact on black children, (c) have been validated for the determination of E.M.R. status or placement in E.M.R. classes" — and these determinations must be accompanied with supporting evidence produced under oath (p. 105).

2. *Disproportionate Placement.* "Defendants are hereby ordered to monitor and eliminate disproportionate placement of black children in California's E.M.R. classes" (p. 105). This part of the order requires detailed reports on a statewide basis. In addition, defendants are ordered to "Direct each school district that reported for the 1977-78 school year, a rate of black E.M.R. pupil enrollment one standard deviation above the district rate of white E.M.R. pupil enrollment, to prepare and adopt a plan to correct the imbalance in rates of enrollment" (p. 106). If that disproportion continues or occurs after a three year period, "the court after hearing may order such further relief as it deems appropriate" (p. 106).

3. *Reevaluations and other class relief.* Defendants "shall direct each school district to reevaluate every black child currently identified as an E.M.R. pupil, without including in the psychological evaluation a standardized intelligence or ability test, that has not been approved by the court. . . . Such reevaluation shall include information derived from: (1) diagnostic tests designed to reveal specific learning needs and to prescribe specific pedagogical approaches; (2) adaptive behavior observation; (3) the child's developmental and health histories. Following the reevaluation, an 'individual educational plan' that specifies the type of supplemental assistance needed to allow the child to return to a regular classroom shall be prepared for each child reevaluated and found to have been misdiagnosed. Such assistance shall then be provided" (pp. 106-07).

Wilson Riles, California Superintendent of Public Instruction, has filed a notice of *appeal* of the *Larry P.* decision with the Ninth Circuit Court of Appeals. The other defendants — the California State Board of Education and the Superintendent and the Board of the San Francisco Unified School District — decided not to appeal. Briefs have not been filed as of this writing, but according to Thomas Griffin, Chief Counsel, California Department of Education, the appeal will focus on the court's finding of intent to discriminate and two aspects of the remedy. The Superintendent will argue that the remedy (1) creates an improper racial quota with its "one standard deviation" criterion, and (2) is overbroad in prohibiting use of IQ tests for diagnostic as well as placement purposes. Future issues of *Footnotes* will keep readers apprised of developments in this appeal. *—MSM*

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